

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 71/2012 OF 18<sup>TH</sup> DECEMBER 2012**

**BETWEEN**

**CHINA JIANGXI INTERNATIONAL KENYA LIMITED...Applicant**

**AND**

**PARLIAMENTARY SERVICE COMMISSION.....Procuring Entity**

Review against the decision of the Tender Committee of the Parliamentary Service Commission dated 23<sup>rd</sup> November, 2012 in the matter of Tender No. NA/018/2011-2012 for Proposed Multi-Storey Office Block For Kenya National Assembly, Nairobi Item No. D29 NB 901 Job No. 7753C.

**BOARD MEMBERS PRESENT**

Mr. Joshua W. Wambua	-	Member (In the Chair)
Ms. Judith Guserwa	-	Member
Mr. Akich Okola	-	Member
Mr. Sospeter Kioko	-	Member
Ms. Natasha Mutai	-	Member

## **INATTENDANCE**

1. Philemon Kiprop - Holding brief for the Secretary
2. Shelmith Miano - Secretariat

## **PRESENT BY INVITATION:**

### **PROCURING ENTITY - PARLIAMENTARY SERVICE COMMISSION**

- |                       |   |                                |
|-----------------------|---|--------------------------------|
| Mr. Antony Njoroge    | - | Legal Counsel                  |
| Mr. Sherifsam Mwendwa | - | Legal counsel                  |
| Mr. Joseph Wamanwa    | - | Legal Counsel                  |
| Ms. Mary Kanyiha      | - | Chief Procurement Officer      |
| Ms. Anne Oganda       |   |                                |
| Mr. Keith Kisinguh    | - | Procurement Officer Parliament |

### **APPLICANT 'S - CHINA JIANGZI INTERNATIONAL KENYA LTD**

- |                       |   |                                |
|-----------------------|---|--------------------------------|
| Mr. Muthomi Thionkalu | - | Advocate, China Jiangxi        |
| Mr. DBM Mosatt        | - | Legal Assistant, China Jiangxi |
| Mr. Allan Ongwen      |   |                                |

## **INTERESTED PARTY**

- |                    |   |                                     |
|--------------------|---|-------------------------------------|
| Mr. Austine Ondoyo | - | Advocate, Milicons Ltd              |
| Mr. Liging         | - | Business Manager, GXPCOHI           |
| Mr. Allan Ongwen   | - | Guangxi Hydro Electric Construction |
| Mr. Fang Botao     | - | "                                   |

- Mr.Zhang Jee - Assistant A. O, China Wu yi
- Mr.Chen Degan - Engineer, China Overseas Engineering

### **BOARD'S DECISION**

Upon hearing the representations of the parties and interested candidates and upon considering the information in all documents before it, the Board decides as follows: -

### **BACKGROUND**

The Procuring Entity advertised Tender No. NA/018/2011-2012 for the proposed multi-storey block for the Parliamentary Service Commission W.P. Item No. D29 NB/NB 901-Job No. 7753C in the Standard and Daily Nation Newspapers of 15<sup>th</sup> June, 2012.

### **Closing/Opening:**

The tender closed and opened on 23<sup>rd</sup> July, 2012 at 11.00 am. The following twelve (12) firms submitted their bids as shown in table 1 below:

**Table 1: Tender Opening Results.**

S/No.	Firm	Bid Security
01	M/s Epc Builders Ltd	Did not attach bid bond on the technical bid
02	M/s Dinesh Construction Co. Ltd.	Ksh.2,000,000.00 (Occidental Insurance)
03	M/s Parbat Siyani Construction Co. Ltd.	Did not attach bid bond on the technical bid.
04	M/s China National Aero-Technology International Engineering.	Ksh.2,000,000.00(Jubilee Insurance Co ltd.)
05	M/s N.K. Brothers Ltd.	Did not attach bid bond on the technical bid

06	M/s Guangxi Hydroelectric Construction Bureau	Ksh. 2,000,000.00 (Cannon Assurance)
07	M/s Seyani Brothers and Co. Ltd.	Did not attach bid bond on the technical bid.
08	M/s China Railway No. 5 Engineering Group	Ksh 2,000,000.00 (Diamond Trust Bank)
09	M/s China Overseas Engineering Group	Ksh. 2,000,000.00 (CFC Stanbic Bank)
10	M/s China Jiangxi International (K) Ltd.	Ksh. 2,000,000.00 (Standard Chartered Bank)
11	M/s Milicons Ltd / SVEC Co. Jv	Did not attach bid bond on the technical bid.
12	M/s China Wu Yi Co. Ltd.	Ksh. 2,000,000.00 (Equity Bank Ltd)

## **EVALUATION**

Evaluation of the received bids was carried out by an Evaluation Committee of sixteen members under the Chairmanship of Qs F.M. King'ori. The committee comprised of officers from Ministry of Public Works (MOPW), Kenya National Assembly (KNA) and the Consultants.

The evaluation was carried out in three stages namely; Preliminary, Technical and Financial evaluation stages.

## **PRELIMINARY EXAMINATION OF THE BIDS**

The bids were evaluated based on whether they had met the mandatory criteria to qualify for detailed evaluation as set out in the advertisement and bid documents. Any bidder not meeting the mandatory criteria would not proceed for detailed technical evaluation. The mandatory criteria included the following:

1. Certificate of registration from the Registrar of Companies either as a limited liability company, partnership or sole proprietorship.
2. Copy of valid Tax Compliance Certificate by KRA.
3. Copy of PIN Certificate.
4. Copy of Audited Financial Accounts for the last two years.
5. Must provide litigation history for the last ten years.
6. Proof of ownership of major items of plant and equipment.
7. Proof of registration with the Ministry of Public Works as Category 'A' contractor for General builder's works.
8. Bid Security in the form of Bank guarantee or bid bond from an insurance company approved by (PPOA) of Kshs. 2,000,000.00 and valid for 150 days from the date of tender opening.
9. Company Profile / List of Directors.
10. Proof of completion of one high rise building of at least 10 floors.
11. Proof of works of similar magnitude and complexity undertaken in the last 5 years.

**Observations:**

- i) The committee noted that it was not expressly stated where the Bid Bond should be placed in the Technical bid or Financial bid. Consequently the committee did not disqualify bidders whose Bid bonds were not placed in the Technical bids and as such final decision was to be made once Financial bids were opened.

- ii) All the Tax Compliance Certificates provided by the bidders were verified for authenticity via KRA's online services as provided on KRA's website - [www.kra.go.ke](http://www.kra.go.ke).

Any bidder who did not meet any of the above requirements was considered **NON-RESPONSIVE** and did not qualify to proceed to the next stage of detailed evaluation. Table 2 below shows the summarized results of the Preliminary evaluation.

**Table 2: Results of the Preliminary Evaluation are summarized below:-**

S/NO	EVALUATION CRITERIA	BIDDERS											
		B1	B2	B3	B4	B5	B6	B7	B8	B9	B10	B11	B12
1	Certificate of registration from registrar of Companies	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES
2	Copy of Valid Tax Compliance Certificate by KRA	YES	NO	NO	NO	YES	YES	YES	YES	YES	YES	YES	YES
3	Copy of PIN certificate	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES
4	Copy of Audited Financial Accounts for the last two years	YES	YES	YES	YES	YES	NO	YES	YES	YES	YES	YES	YES
5	Litigation history for the last 10 years	YES	YES	YES	YES	YES	YES	YES	YES	NO	YES	YES	YES
6	Proof of ownership of Major items of Plant and Equipment	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES
7	Registration with Ministry of Public Works as category 'A' contractor	YES	YES	YES	NO	YES	YES	YES	YES	YES	YES	YES	YES

S/NO	EVALUATION CRITERIA	BIDDERS											
		B1	B2	B3	B4	B5	B6	B7	B8	B9	B10	B11	B12
8	Bid Security of Kshs. 2,000,000.00 as Bank guarantee or bid bond.	—	YES	—	YES	—	YES	—	YES	YES	YES	—	YES
9	Company profile	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES
10	Proof of completion of one high rise building of at least 10 floors.	YES	YES	YES	YES	YES	YES	YES	YES	NO	YES	YES	YES
11	Proof of works of similar magnitude and complexity in the last 5 years	YES	YES	YES	YES	YES	YES	YES	YES	NO	YES	YES	YES
Evaluator's comment		R	NR	NR	NR	R	NR	R	R	NR	R	R	R

**Key**

- R : Responsive  
NR : Not Responsive  
— : Did not attach bid bond on technical bid.

**Under listed below are Explanatory Notes by the Committee**

From table 2 above, five (5No.) bidders were not responsive to the mandatory requirements of the tender as stated below;-

**a) Bid (02) - M/s Dinesh Construction Co. Ltd.**

The bidder provided a copy of Tax Compliance Certificate that had expired on 27th January, 2012 thus invalid at close of the initial Tender opening date of 9th July, 2012.

**b) Bid (03) - M/s Parbat Siyani Construction Ltd.**

The bidder provided a copy of Tax Compliance Certificate that had expired on 16th June, 2012 thus invalid at close of the first initial Tender opening date of 9th July, 2012.

**c) Bid (04) - M/s China National Aero-Technology International Engineering.**

- i) The bidder provided a copy of Tax Compliance Certificate that had expired on 24th May, 2012 thus invalid at close of the first initial Tender opening date of 9th July, 2012.
- ii) The bidder did not provide a copy of current registration certificate from the Ministry of Public Works.

**d) Bid (06) - Ghuangxi Hydroelectric Construction Bureau.**

The bidder did not provide a copy of Audited Financial results for 2011 and therefore did not qualify for further evaluation.

**e) Bid (09) - M/s China Overseas Engineering Group Ltd.**

- i) The bidder did not state whether they have any litigation history.
- ii) The bidder did provide proof of completion of any high rise building of at least 10 floors.
- iii) The bidder did not provide proof of completion of works of similar complexity and nature in the last 5 years.



From the above observations and analysis the following seven (7 No.) bids met all the mandatory requirements for the tender and therefore qualified for further evaluation.

- a) (01) - M/s Epco builders Ltd.
- b) (05) - M/s N.K. Brothers Ltd.
- c) (07) - M/s Seyani Brothers & Co. Ltd
- d) (08) - M/s China Railway No. 5 Engineering Group
- e) (10) - M/s China Jiangxi International (K) Ltd
- f) (11) - M/s Milicons Ltd /SVEC Construction Jv
- g) (12) - M/s China Wu Yi Co. Ltd.

#### **Detailed Technical Evaluation.**

The seven bids that qualified for detailed evaluation were evaluated based on the following evaluation criteria:-

(A) Staff Qualifications:

- Adequacy of staff in accordance with minimum requirements.
- Qualification of Directors (1 no Director or partner).
- Experience of Directors (1 no Director or Partner).

(B) Plant and Equipment:

- Equipment owned by the firm
- Proof of ownership of at least four of the listed equipment.
- Adequacy of the equipment
- Age and condition of the equipment

(C) Office and service facilities of the firm:

- Own premises

- Own functional workshop.
- (D) Experience of the firm:
- 2no completed projects.
  - Litigation or history of claims.

(E) Financial status of the firm:

- Average annual turnover of the firm.
- Liquidity (cash in bank or redeemable securities).
- Fixed assets of the firm.

Each bid was examined independently by each evaluator, scored and averaged. Table 3 below shows the results of the technical evaluation based on the above criteria.

**Table 3: Detailed Technical Evaluation Scores**

Bid No.	Bidders	Evaluators								Average score	Remarks
		E1	E2	E3	E4	E5	E6	E7	E8		
01	M/s Epco Builders	88	95	99	100	96	100	100	90	96.8	Pass
05	M/s N.K. Brothers Ltd.	90	86	84	92	100	92	83	86	89.1	Pass
07	M/s Seyani Brothers & Co. Ltd.	73	91	77	79	71.5	76	85	66	77.3	Pass
08	M/s China Railway No. 5 Engineering Group.	79	92	88	88	96	100	88	90	90.1	Pass
10	M/s China Jiangxi International (K) Ltd.	98	96	98	100	98	98	98	95	98.0	Pass

11	M/s Milicons Ltd / SVEC Co. Jv.	97	85	92	96	78	100	70	96	88.3	Pass
12	M/s China Wu Yi Co. Ltd.	100	98	98	100	99	100	100	100	99.3	Pass

From the scores in the above table, all the seven (7No) bidders scored above the pass mark of 65% as stipulated in the tender document and therefore qualified for financial evaluation.

As part of the technical evaluation, the committee resolved to undertake due diligence on the following issues:

1. Bidders capacity: A select committee was given the task of visiting ongoing sites within Nairobi and also confirming their projects progress and availability of offices and workshops.
2. The committee also sought to obtain confirmation from the following bodies concerning details given by the bidders.
  - a. Ministry of Public Works - Registration status of the contractors.
  - b. Registrar of companies - To verify registration status / directors.
  - c. Registrar of Judiciary - To confirm Litigation history if any.
  - d. Chinese and Indian Embassies - Authenticity of international projects.

## FINANCIAL EVALUATION

The Financial Proposals for the technically qualified bidders were opened on 14<sup>th</sup> September, 2012.

The bid amounts as contained in the Form of tenders opened were as shown in table 4 below

**Table 4: Bid amounts for evaluated firms.**

Bid No.	Tenderer	Tendered Amount (Kshs)	Bid Bond	Remarks
12	M/s China Wu Yi Co. Ltd.	5,648,000,000.00	Equity Bank	Valid
10	M/s China Jiangxi International (K) Ltd.	5,893,646,849.67	Standard Chartered Bank	Valid
1	M/s Epc Builders Ltd.	6,027,527,200.00	Mayfair Insurance	Valid
11	M/s Milicons Ltd & SVEC Co. Jv.	6,077,088,099.00	Canon Assurance	Valid
05	M/s N.K Brothers Ltd.	6,555,909,101.00	Intra Africa Insurance	Valid
07	M/s Seyani Brothers & Co Ltd.	6,754,567,612.00	Intra Africa Insurance	Valid
08	M/s China Railway No. 5 Engineering Group Ltd.	7,797,172,381.58	Diamond Trust Bank	Valid
-	Official estimates	5,946,831,661.00	-	-

### **Observation.**

M/s Epc builders Co Ltd. and M/s N.K. Brothers Ltd. gave their tender validity for 60 days ending on 23rd September, 2012 contrary to the 120 days stipulated in the Appendix to conditions of contract.

The table below indicates the comparison between the tendered amounts and the estimated amount for all the bidders above.

**Table 5 - Tenders received from the bidders and their comparison with the estimate.**

Bid No.	Tenderer	Tendered Amount (Kshs)	Estimated Amount (Kshs)	Bid % of Estimate	Variance %
12	M/s China Wu Yi Co. Ltd.	5,648,000,000.00	5,946,831,661	94.97%	(-)5.03%
10	M/s China Jiangxi International (K) Ltd.	5,893,646,849.67	5,946,831,661	99.10%	(-)0.9%
11	M/s Milicons Ltd & SVEC Co. Jv.	6,077,088,099.00	5,946,831,661	102.19%	2.19%
07	M/s Seyani Brothers & Co Ltd.	6,754,567,612.00	5,946,831,661	113.58%	13.58%
08	M/s China Railway No. 5 Engineering Group Ltd.	7,797,172,381.58	5,946,831,661	131.11%	31.11%

The bids are fairly competitive as observed from the tenders submitted and outlined in Table 5 above. However M/s Seyani Brothers & Co Ltd and M/s China Railway No 5 engineering group have a variance of above 10% to the official estimates.

**Due diligence.**

The tender evaluation committee also set-out to carry due diligence on the firms that had been responsive to the technical criteria as set out in the technical bid.

The information required is mandatory as set out in the mandatory requirements in the technical bid and failure to comply leads to automatic disqualification. Table 06 below shows the findings.

**Table 06 Results on Due diligence.**

Bid No.	Tenderer	Company Registration	Litigation History	Ongoing works of similar nature & complexity
12	M/s China Wu Yi Co. Ltd.	✓	x	✓
10	M/s China Jiangxi International (K) Ltd.	✓	✓	✓
11	M/s Milicons Ltd / SVEC Co. Jv.	✓	✓	✓
07	M/s Seyani Brothers & Co. Ltd.	✓	x	✓
08	M/s China Railway No. 5 Engineering Group Ltd.	✓	✓	X

**Key:-**

✓ :Responsive / correct information

X :Non-Responsive / declared incorrect information

**Observations**

**Company Registration**

Upon Writing to the registrar of companies to confirm registration status of the five bidders, three firms namely; **M/s Milicons Ld / SVES Co. Jv, Ms Seyani brothers and company Ltd, M/s China Railway No. 5 Engineering group co. ltd** were confirmed to be dully registered. However the registrar

of companies requested the committee to give them the registration numbers of M/s China Wu Yi Co Ltd and M/s China Jiangxi International (K) Ltd. for confirmation of their registration. These firms were also confirmed to be registered vide letter dated 18/9/2012

### **Experience in works of a similar nature & complexity**

Where the foreign contractors had cited such works as having been performed in their source countries, the tender evaluation committee sought information from the relevant consulates. However this information could not be established from the consulates.

### **Litigation History**

The Judiciary advised the tender evaluation committee to confirm with the Kenya Law Reports regarding the cases filed in court by the bidders. The committee checked the details online and established as below;

#### **China Wu Yi Co. Ltd**

- They have cases which they failed to declare as part of their litigation history

M/s China Wu Yi Co. Ltd are therefore adjudged non-responsive and disqualified from further evaluation.

### **Seyani Brothers Co. Ltd**

- They have cases which they failed to declare as part of their litigation history

M/s Seyani Brothers Co. Ltd are therefore adjudged non-responsive and disqualified from further evaluation.

From the above analysis, the following bidders qualified for further evaluation;

- 1) M/s China Jiangxi International (K) Ltd.
- 2) M/s Milicons Ltd / SVEC Co. Jv.
- 3) M/s China Railway No. 5 Engineering Group Ltd.

### **Detailed Tender Analysis**

The detailed analysis includes:-

- Arithmetic check
- Analysis of pricing

#### **Arithmetic Check**

The bid comparison to the official estimate as well as the arithmetic errors upon correction vis-à-vis the tender sum are tabulated in Table 7 :



**Table 7 - Comparison of the corrected tender of the responsive bidders**

	Tenderer	Tendered Amount (Kshs)	Variance from Estimate %	Corrected Tender Amount (Kshs)	% Error
1	M/s China Jiangxi Int. (K) Ltd.	5,893,646,849.67	(-)0.9%	5,893,595,230.82	0.00167%
2	M/s Milicons Ltd / SVEC Co. Jv.	6,077,088,099.00	2.19%	6,077,088,099.00	NIL
3	M/s China Railway No. 5 Eng. Co. Ltd.	7,797,172,381.58	31.11%	7,797,172,381.58	NIL

From Table 7 above, the tender bids offered by the responsive tenderers range from (-) 0.9% above estimate to 31.11% below the estimate.

**(a) Arithmetic Errors**

The responsive bids were subjected to arithmetic check in accordance with Clause 5.7 (d, e & f) of the "Instructions To Bidders" in order to establish the error adjustment factor. Error adjustment factor is the factor by which the tender rates would be adjusted if the respective tender is successful.

Tender No.2 and No. 3 had no errors whereas bidder number 01 had a negligible error.

## Analysis of Pricing

**Table 08: shows summary of rates**

ITEM	ESTIMATE	UNIT	TENDERED RATES		
			M/s China Jiangxi	M/s China Rail No. 5	M/s Milicons
Normal Excavation	375	CM	200	300	325
Excavation in rock	2,200	CM	2,400	145	2200
Reinforced Concrete Class 30/20	14,200	CM	15,543	18,355	14,400
Reinforced Concrete Class 25/20	13,000	CM	14,350	17,764	12,300
Steel Reinforcement	140	KG	120	230	142
Sawn Formwork	500	SM	600	2,145	675
200 mm thick Solid Block Walling	2,100	SM	1,512	3,108.9	1,950
Structural Steel	200	KG	300	210.14	190
Aluminum doors	12,000	SM	12,760	13,074	12,600
Aluminum windows	12,000	SM	10,754	16,261	13,250
Porcelain tiles	2,600	SM	1580	4,919.67	2,600
Alluco bond	14,500	SM	9558	11,898.97	16,000
Curtain Walling	12,100	SM	27,480	8,276.31	15,500
Plaster	300	SM	230	383.39	300

From Table 8 above, the tender rates for M/s China Jiangxi Co. Ltd & M/s Milicons Ltd. / SVEC JV Ltd are very competitive and compare well with the estimate. The rates in the bids by M/s China Railway No. 5 Eng. Co. Ltd are very high as compared to the estimate are considered **non-competitive**.

The above overview is also borne out of the overall tender sum. This can be observed from their tabulated variances with the estimate as outlined previously in Table 5 where the bidders have a variance from 0.9% below the estimate to 31.11% above respectively.

## **Conclusion**

### **China Jiangxi International (K) Ltd**

- M/s China Jiangxi Int. Co. (K) Ltd have submitted the lowest responsive financial bid of *Kshs. 5,893,646,849.67 (Five billion, Eight hundred & Ninety Three million, Six hundred Forty Six thousands, Eight hundred & Forty Nine Kenya Shillings & Sixty Seven Cents)*.
- The bid is 0.9% below the estimate.
- Their arithmetic error is negligible and their rates compare well with the estimate.

### **Milicons Ltd/SVEC Co. JV Ltd**

- M/s Milicons Ltd/SVEC Co. JV Ltd have submitted the second lowest financial bid of *Kshs. 6,077,088,099.00 (Six billion, Seventy Seven million, Eighty Eight thousands & Ninety Nine Only)*,
- The bid is 2.19% above the estimate.
- They have no arithmetic error and their rates compare well with the estimate.

### China Railway No. 5 Eng. Co. Ltd

- M/s China Railway No.5 Eng. Co. Ltd have submitted the third lowest financial bid of *Kshs. 7,797,172,381.58 (Seven billion, Seven hundred & Ninety Seven million, One hundred & Seventy Two thousands & Three hundred & Eighty One Kenya Shillings & Fifty Eight Cents)*
- The bid is 31.11% above the estimate.
- They had no arithmetic error in their financial bid.
- Their rates are very high when compared to the estimate and to the bids submitted by the two lowest responsive tenderers and therefore non-competitive.

### RECOMMENDATION

From the above analysis the lowest responsive bid submitted by M/s. **China Jiangxi International (K) Ltd** with a tender amount of *Kshs. 5,893,646,849.67 (Five billion, Eight hundred & Ninety Three million, Six hundred Forty Six thousands, Eight hundred & Forty Nine Kenya Shillings & Sixty Seven Cents)* was recommended for award of this tender.

### TENDER COMMITTEE DECISION

The National Assembly Tender Committee at its 19<sup>th</sup> 2012-2013 meeting held on 13<sup>th</sup> December, 2012 discussed the report presented before it by Mr. Njoroge and by consensus resolved that the works be retendered as none of the bidders met all the mandatory requirements as indicated in the Tender documents.

## THE REVIEW

The Request for Review was lodged by China Jiangxi International Kenya Limited on 18<sup>th</sup> December, 2012 in the matter of Tender No: NA/018/2011-2012 for Proposed Multi-Storey Office Block for Kenya National Assembly, Nairobi Item No. D29 NB 901 Job No. 7753C.

The Applicant was represented by Mr. Muthomi Thionkalu, Advocate, While the Procuring Entity was represented by Mr. Antony Njoroge, Legal counsel. Mr. Austine Ondoyo, Advocate representing Millicons Ltd, Mr. Liging representing GXPCOHI, Mr. Allan Ongwen representing Guangxi Hydro Electric Construction , Mr. Zhang Jee representing China Wu yi, while Mr. Chen Degan representing , China Overseas Engineering

The Applicant requested the Board for the following orders:

1. *The Respondent be directed to evaluate and/or report to the Board on the evaluation of the tenders in Tender No. NA/018/2011-2012 for Proposed Multi-Storey Office Block for Kenya National Assembly, Nairobi WP Item No. D29 NB 901 Job No. 7753C*
2. *Any other remedy that the Board may deem fit to give under section 98 of the Act including but not limited to awarding the tender to the Applicant.*
3. *Costs be provided for.*

At the commencement of the hearing of the instant matter the Procuring Entity sought leave to argue its Preliminary Objection which it had filed on

the 24<sup>th</sup> day of December 2012 together with its Response to the Request for Review. The Board then proceeded to hear the parties' arguments on the issue as follows:-

### **PRELIMINARY ISSUE ON JURISDICTION OF THE BOARD**

The Procuring Entity submitted that it had terminated the procurement process under the provisions of Section 36 of the Act. It argued that the termination was effected on the 19<sup>th</sup> of December 2012 following a decision of the Tender Committee in its meeting of 13<sup>th</sup> December 2012. It further argued that the Procuring Entity reserved the right to terminate the tender process without entering into a contract and once such termination was effected the Board lacked jurisdiction to entertain any Application for review emanating there from in accordance with the provisions of Section 36 (1) of the Act.

The Procuring Entity further informed the Board that although it was notified of the filing of the instant Request for Review on 18<sup>th</sup> December 2012, it proceeded to issue the notification letters of the of the termination of the subject tender to the bidders as a decision to that effect had already been made by the tender committee.

In response, the Applicant stated that there was no valid Preliminary Objection before the Board for hearing and determination on the grounds that the Preliminary Objection was based on facts and not the law. It informed the Board that the instant application was filed on the 18<sup>th</sup> of

December 2012 before the purported notification of the termination of the tender was issued to the bidders.

The Applicant added that the Procuring Entity could only raise the Preliminary Objection if it had complied with the requirements of Section 36 of the Act. It argued that Section 36 of the Act required a Procuring Entity to give prompt notification of a termination of a tender to the bidders as well as file a written report of the same with the Director General of the Public Procurement Oversight Authority which requirements had not been met by the Procuring Entity.

It referred the board to its finding in Application No. 21 of 2009; *Tudor Services Ltd vs. National Oil Corporation* in which it nullified the termination of a tender by the Procuring Entity when the same did not meet the requirements of Section 36 of the Act.

Finally, it argued that the Preliminary Objection was incompetent as it had not been filed within five (5) days of service of the Application as per Regulation 77. It urged the Board to overrule the Preliminary Objection to pave way for the hearing of the Request for Review on merit. One of the interested parties namely M/s Millicons Ltd /SVEC JV LTD... Associated itself with the submissions of the Applicant and also urged the Board to overrule the Preliminary Objection as raised by the Procuring Entity.

The Board has carefully considered the submissions of the parties and examined the documents that have been submitted before it.

The Board notes that Section 36(1) of the Act allows a Procuring Entity to terminate procurement proceedings at any stage without entering into a contract upon compliance with the following requirements.

**Section 36(2):-**

*"The procuring entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the procuring entity was negotiating."*

*(4) "If the procurement proceedings involved tenders and the proceedings are terminated before the tenders are opened, the procuring entity shall return the tenders unopened."*

*(7)" A public entity that terminates procurement proceedings shall give the Authority a written report on the termination."*

From the foregoing questions that arise for the determination by the Board are:-

- a) Whether the termination of the procurement process by the Procuring Entity was carried out in accordance with Section 36 of the Act.
- b) Whether the Board has jurisdiction to hear and determine the instant Request for review.

On the question of the purported termination, the Board has noted that the Procuring Entity procedurally advertised the subject tender on the 15<sup>th</sup> of



June 2012 and closed/opened the bids on 23<sup>rd</sup> July 2012. Thereafter, the bids were subjected to preliminary, technical and financial evaluation as required by the Act. The Board further notes that on the 22.11.2012, the Evaluation Committee's recommendation was placed before the Tender Committee for further deliberations. The recommendation of the Evaluation Committee was placed before the Tendering Committee on 13<sup>th</sup> December 2012 when it was resolved as follows:

*"The works on the construction of the proposed Multi Storey office block - Main works be re-tendered as. None of the bidders met all the mandatory requirements as indicated in the tender document."*

- The Board further notes that the decision to retender was made on the 13.12.2012 before a decision to terminate the ongoing subject tender process was made.
- The Board also notes that although the decision to retender was made on 13<sup>th</sup> December 2012, notification of the same was allegedly dispatched to the bidders by ordinary post on the 19<sup>th</sup> December 2012 although there was no evidence from the Procuring Entity to back up this assertion as the bidders denied having received the notices during the hearing hereof.
- Further, the Board notes that the Procuring Entity was notified of the filing of the instant application on the (18<sup>th</sup> December 2012) yet the Procuring Entity proceeded to issue the notification letters to the bidders the following day on the 19.12.2012.

The Board is also alive to the fact that the Form 5 that the Procuring Entity completed and returned to the Board with the Response to the instant Request for Review indicated that the tender process was NOT terminated. This form was filed at the Board on 24<sup>th</sup> December 2012, five (5) days after the purported notification to the bidders of the termination and 11 days after the purported decision was made by the Tender Committee. During the hearing, the Procuring Entity informed the Board that the said Form 5 was erroneously filled

From the foregoing, it is clear to the Board that the purported termination of the tender process by the Procuring Entity was not done in accordance with the requirements of Section 36 of the Act for the following reasons:-

1. The purported notification to the bidders issued on 19<sup>th</sup> December 2012 was not a prompt notification as envisaged by Section 36(e) of the Act.
2. The purported termination notice should not have been issued on 19<sup>th</sup> December 2012 when the instant proceedings were already filed before this Board and the Procuring Entity had been notified not to take any further action on the tender process. Consequently, a termination notice issued to bidders when proceedings had been commenced in this Board is of no consequence, and therefore null and void.
3. The Procuring Entity did not file with the Director General of PPOA a written report in terms of Section 36(7) of the Act and fails fact was admitted by the Procuring Entity.

Taking into consideration the above matters, the Board holds that the purported termination of the tender by the Procuring Entity is a nullity and the Board has jurisdiction to hear and determine this Request for Review on merit.

Accordingly, the Preliminary Objection fails.

The hearing may proceed.

Following the delivery of the Ruling on the Preliminary Objection on the 14<sup>th</sup> day of January 2013, the Board directed the parties to proceed with the hearing of the Request for Review on merit.

In this regard the Applicant proceeded to argue its grounds of Appeal as hereunder:-

**Ground NO. 1: Breach of Sections 2, 66(6) of the Act and Regulation 46**

The Applicant stated that the Procuring Entity had failed to evaluate the subject tenders within 30 days as provided by Section 66(6) of the Act. It argued that the Subject tender was scheduled to be closed/opened on the 9<sup>th</sup> day of July 2012 but the date was pushed to the 23<sup>rd</sup> July 2012. It stated that under Regulation 46, the evaluation of the bids started to run on the 23<sup>rd</sup> of July 2012 and the 30 days lapsed on the 23<sup>rd</sup> of August 2012, after a period of 30 days.

The financial evaluation ought to have commenced 5 days after the 23<sup>rd</sup> day of August 2012 and completed on 28<sup>th</sup> August 2012.

The Applicant further argued that the Procuring Entity breached Section 66 read together with Section 2 of the Act which deals with the objectives and spirit of the law of procurement.

It maintained that it submitted a responsive bid in every respect contrary to the allegations of the Procuring Entity to the effect that all the bids were non-responsive. It stated that its bid conformed to all the mandatory requirements of the tender including provision of an accurate litigation history as was required by the Procuring Entity. It placed before the Board two distinct definitions of the term "Litigation" as set out in the Black Law dictionary as well as the Oxford Advanced Learners Dictionary.

It further referred the Board to the provisions of Article 159 of the Kenya Constitution which deals with the exercise of Judicial powers by Courts and Tribunals thereby distinguishing the power of the Courts with regard to litigation vis a vis the powers of a Board or Tribunal.

It argued that in its opinion the requirement of the litigation history as required by the Procuring Entity was with regard to cases or suits that had been filed in a conventional Court and not the Board or Tribunal. It further argued that the Applicant was not a party to any pending or finalized suit in any court of law, and as such, it had given an accurate litigation history to the Procuring Entity thereby making its bid the most responsive bid for the award of tender.

In response the Procuring Entity stated that its Tender Committee met on the 13<sup>th</sup> of December 2012 and resolved to terminate the tender under the provisions of Section 36 of the Act. It argued that the termination was premised on the basis that none of the bidders had met the mandatory requirements set out in the tender documents. It stated that the Applicant filed the instant Application on the 18<sup>th</sup> of December 2012 before the notice of termination could be communicated to the bidders.

It argued that it reserved the right to reject any or all the tenders before signing a contract which decision was not amenable to review under Section 93 (2)(b) of the Act. It further argued that the subject tender was a very complex project of huge economic and engineering proportions and hence the long time it took to evaluate the bids. It added that it endeavored to ensure that the purpose of Section 2 of the Act was strictly adhered to.

Finally it argued that the Application as filed was already overtaken by events as the subject tender was evaluated and subsequently terminated on the 13<sup>th</sup> December 2012. It stated that the Tender Committee having completed its work, the prayers being sought by the Applicant could not be issued.

It maintained that the subject tender was valid for a period of 120 days commencing the 3<sup>rd</sup> day of July 2012 and lapsing on the 23<sup>rd</sup> day of

November 2012 and hence there was no tender to award. It stated that the evaluation process took too long as the two responsive bidders had not disclosed their litigation history as required by the I.T.T – Clause I.J. 11) as it was later discovered that the two bidders had pending matters at the board as well as the High Court.

It added that the criterion of litigation history covered matters filed at the Board which is a *quasi* judicial body as envisaged by Article 159 of the Constitution.

It argued the board to find that the Applicants' tender was not responsive and further that the subject tender had been terminated and therefore allow it to retender.

The Board has carefully considered the submissions of the parties and the documents presented before it and notes the following:-

The issues that arise for determination are as set out below:-

- a. Whether the evaluation and award of the subject tender have been procedurally finalized.
- b. What is the effect of the alleged termination in relation to the tender validity period?

To be able to answer the foregoing questions the Board has noted the following:-

1. The Procuring Entity advertised Tender No. NA/018/2011-2012 for

the proposed Multi-storey block for the PSC W.P item No. D29 NB/NB 901-Job No. 7753C in the Standard and Daily Nation Newspapers of 15<sup>th</sup> June 2012.

2. The tender closed/opened on 23<sup>rd</sup> July 2012 at 11.00 a.m. and attracted 12 bidders.
3. The evaluation of the bids was carried out in three stages namely the Preliminary Technical and Financial evaluation stages.
4. At the close of the preliminary stage, 5 bidders were disqualified as being non responsive leaving 7 bidders to proceed to the technical evaluation stage.
5. The Seven bids that had qualified for the detailed technical evaluation were evaluated based on the criteria set out in the bid documents at Clause 1.5 of the Instruction To Tenderers
6. That all the seven (7) bidders scored above the 65% pass mark and qualified for the financial evaluation.
7. Further the Seven (7) bids were evaluated on the following criteria:-
  - a. Due diligence
  - b. Company registration
  - c. Experience in works of a similar nature and complexity
  - d. Litigation history
8. The Applicant and two other bidders M/s Milicons Ltd / SVEC Co. Jv. and M/s China Railway No. 5 Eng. Co. Ltd. were qualified for further evaluation after the foregoing analysis.
9. The three (3) bidder's price proposals were subjected to arithmetic check and analysis of the pricing.

10. At the conclusion of the financial evaluation the Applicant's bid of Kshs. 5,893,646,849.67 was found to be the **lowest** responsive financial bid, while the other 2 bidders namely M/S Millicons Hill SVEC-Co. JV ltd and M/S China Railway No. 5 Eng. Co. Ltd were declared the second and third lowest responsive bidders respectively.

11. That the at financial evaluation stage the bid prices were compared with the estimate and the results were as follows:-

	Tenderer	Tendered Amount (Kshs)	Variance from Estimate %	Corrected Tender Amount (Kshs)	% Error
1	M/s China Jiangxi Int. (K) Ltd.	5,893,646,849.67	(-)0.9%	5,893,595,230.82	0.00167 %
2	M/s Millicons Ltd / SVEC Co. Jv.	6,077,088,099.00	2.19%	6,077,088,099.00	NIL
3	M/s China Railway No. 5 Eng. Co. Ltd.	7,797,172,381.58	31.11%	7,797,172,381.58	NIL

12. The Procuring Entity Evaluation Committee recommended the Applicant to the Tender Committee for the award of the tender.

13. That when the evaluation report recommending the Applicant was placed before the Tender Committee on the 13<sup>th</sup> December 2012 the said Committee recommended the retendering of the works on the basis that none of the bidders met all the mandatory requirements as set out in the tender documents.



14. That at that point in time the subject tender was neither terminated nor awarded by the Tender Committee which instead ordered for a retender.
15. That the evaluation of the tender was conducted from 24<sup>th</sup> July, 2012 to 29<sup>th</sup> August, 2012 and as at the 13<sup>th</sup> day of December 2012 when a decision to retender was made the tender validity period had lapsed, save that the bidders bid bonds for all the bidders were still valid
16. That as at the 13<sup>th</sup> day of December 2012 when the Tender Committee was discussing the evaluation report, it had already received another report from a 3 member committee whom it had directed to re-evaluate the tenders on the criteria of litigation history.
17. That the Applicant having received no communication from the Procuring Entity lodged this Request for Review on the 18<sup>th</sup> day of December 2012. This application was served on the Procuring Entity the same day namely 18<sup>th</sup> December, 2012.
18. The Procuring Entity then decided to issue the notification of the termination of the tenders on 19<sup>th</sup> day of December 2012 after being served with the Board's letter of notification of the filing of the instant Request for Review which directed it in part as follows:-

*"Please note that according to the Public Procurement and Disposal Act 2005, the procurement process should be stopped and no contract subject to the Regulations can be signed between*

*the Procuring Entity and the successful tenderer until the appeal has been finalized."*

19. On the 24<sup>th</sup> of December 2012 the Procuring Entity filed its Response to the Request for Review at the Board together with Form 5 in the 1<sup>st</sup> Schedule which sets out documents and the information required to be submitted by a Procuring Entity to the Board. Upon filing of a Request for Review, the Board notes that part (a) of the declaration form states that:-

Part A -Mandatory declarations (all cases)

*"All the tenders which are subject matter of the Appeal have been rejected pursuant to Section 36 of the Act"*

20. In response to the declaration under form 5 parts A (a) the Procuring Entity indicated that no tenders had been rejected pursuant to Section 36 of the Act. It also indicated that there were no documents to be submitted in respect of Section 36 as there was no termination.

21. It is further noted that the Form 5 aforesaid has a declaration part to be signed by the Authorized officer of the Procuring Entity stating that the declarations in Part A are true to the best of his knowledge. This part is signed by Mr. Keith Musyoki Kisinguh, Procurement Officer of the Procuring Entity.

From the foregoing it is clear that the Procuring Entity purported notification of the termination of the tender on the 19<sup>th</sup> day of December 2012 was done in order to defeat the request for review that had been filed on the 18<sup>th</sup> day of December 2012. We have come to this conclusion because of the reasons set out in the ruling on the Preliminary Objection in the early part of this award.

Further, the Board finds the purported re-evaluation of the tenders on the criterion of litigation history by the 3 member team appointed by the Tender Committee was clearly done in error as the said team did not have any mandate to re-evaluate the tenders which is the preserve of the evaluation committee and was therefore in breach of Regulation 10 and 11 which provide as follows:

Regulation 10. (1):-

*A Procuring Entity shall establish a tender committee in the manner set out in the Second Schedule.*

*(2) The functions of the tender committee shall be to-*

*(a) Review, verify and ascertain that all procurement and disposal has been undertaken in accordance with the Act, these Regulations and the terms set out in the tender documents;*

*(b) Approve the selection of the successful tender or proposal*

*(c) Award procurement contracts in accordance with thresholds prescribed in First Schedule;*

- (d) Ensure that funds are available for the procurement under consideration;*
- (e) Ensure that the Procuring Entity does not pay in excess of prevailing market prices;*
- (f) Review and approve aggregation of procurements where proposed;*
- (g) Review and approve the use of lots where packaging into lots has been proposed;*
- (h) review the selection of procurement method and where a procurement method, other than open tender, has been proposed, to ensure that the adoption of the other procurement method is in accordance with the Act , these Regulations and any guidelines stipulated by the Authority;*
- (i) approve the list of tenderers in cases of restricted tendering pursuant to regulation 54(3);*
- (j) Approve the list of persons qualified to submit proposals pursuant to section 80 of the Act;*
- (k) Approve the list of persons to be given requests for quotations pursuant to regulation 59(2);*
- (l) Approve negotiations under the Act, these Regulations and as may be stipulated by the Authority;*
- (m) Approve the amendment of contracts previously awarded by the tender committee, in accordance with the Act and these Regulations;*

*(n) Review the quarterly reports on quotations that have been awarded by the procurement committee.*

*(o) Undertake any other functions and duties as are provided Under the Act, these Regulations or as may be stipulated by the Authority.*

*r11. (1) in considering submissions made by the procurement unit or evaluation committees, the tender committee may-*

*(a) Approve a submission; or*

*(b) Reject a submission with reasons; or approve a submission, subject to minor clarifications by the procurement unit or evaluation committee.*

*(2) The tender committee shall not-*

*(a) Modify any submission with respect to the Recommendations for a contract award or in any other respect;*

*(b) Reject any submission without justifiable and objective reasons;*

*(c) Where the tender committee rejects the recommendation of the evaluation committee, the decision shall be reported to the head of the Procuring Entity or to the accounting officer*

*(3) Any submission rejected by the tender committee may be resubmitted and the tender committee shall provide an explanation and a justification for its decision thereof.*

With regard to the issue of whether or not litigation history extends to matters filed before the Board, the Board holds that Review Applications filed before it are part of the procurement process as set out in the Act and do not form part of litigation history as envisaged by Section 31(1)(c) of the Act which provides as follows:-

*Section 31(1) (c) "the person is not insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing"*

On the issue of whether or not the subject tender lapsed by effluxion of time, the Board therefore holds that the tender validity period in this case lapsed before the award of tender but before the bidders bid bonds had lapsed. In this case whereas the tender validity period lapsed during the time when all Bidders Bid bonds were still valid up to and including the time the Application for review which was filed on the 18<sup>th</sup> December, 2012. Consequently the Board finds that the purported effluxion of time by the Procuring Entity cannot hold.

The Board notes that Article 159(2) of the Constitution imposes on Courts and Tribunals a duty to dispense substantial justice without regard to undue technicalities. The Article states as follows:-

*(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*

*(a) Justice shall be done to all, irrespective of status;*

*(b) Justice shall not be delayed;*

*(c) Alternative forms of dispute resolution including Reconciliation, mediation, arbitration and traditional dispute Resolution mechanisms shall be promoted, subject to clause*

*(d) Justice shall be administered without undue regard to Procedural technicalities; and*

*(e) The purpose and principles of this Constitution shall be Protected and promoted.*

It is therefore clear to the Board that the Procuring Entity has attempted to rely on technicalities to oust the jurisdiction of the Board which cannot withstand legal requirements as set out in the foregoing provision of Article 159(2) of the constitution.

In view of the foregoing the Board holds that the Procuring Entity and specifically the Tender Committee has failed to observe the provisions of the Act and Regulations, thereby leading to a flawed procurement process.

In the premises the Board holds as follows:-

- i. Having found that as at the time the Application was filed before the Board all the bid bonds were still valid. In the circumstance the Board orders that the Procuring Entity should proceed to award the tender to the bidder whose bid was declared to be the lowest evaluated in accordance with the recommendation of the Evaluation Committee and the Provisions of the Act.

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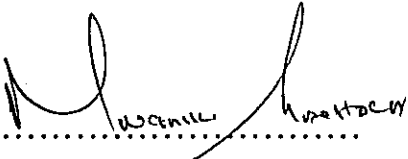
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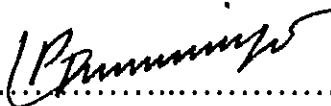
- ii. There are no orders as to costs.

Dated at Nairobi on this 17<sup>th</sup> day of January, 2013



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**CHAIRMAN  
PPARB**



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**AG. SECRETARY  
PPARB**

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